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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, and CALNEV PIPELINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., et al.,

Respondents.

RESPONDENT DORIA MINING AND ENGINEERING CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Here is a case where Petitioners are praying that this Court issue a Writ of Certiorari to review the judgment entered on November 2, 1979 by the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit after long and careful deliberation herein, determined that "Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record". The Ninth Circuit went on to say that "If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted,

nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left *without any forum in which to argue the allegedly fraudulent basis of the administrative judgment.*" (emphasis added) (page 7 of Appendix "A" to Petition for Writ of Certiorari).

Respondent DORIA is the one who would be prejudiced by such fraud and perjury. The United States Court of Appeals for the Ninth Circuit went on to state that "we conclude that importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us, *outweighs any countervailing interest which administrative agencies and other parties which appear before them may have in the finality of agency decisions.*" (emphasis added) (See page 8 of Appendix "A" to Petition herein.)

Admittedly by Petitioner's opening statement, only the State of California acting by and through the Department of Transportation and Calnev Pipeline Company are petitioning this Court for a Writ of Certiorari. (Page 1 and 2 of Petition) This is interesting because it is *they* who are the ones charged by Respondent Doria with fraud and the use of perjured testimony. It is clear that only *they* appear to be unhappy with the decision of the United States Court of Appeals, Ninth Circuit, which remands this case back to the United States District Court for a determination of the alleged fraud.

Respondent's Secretary of the Interior and Douglas Leisz as Regional Director of the United States Forest Service and Harold Mitchell as Acting Forest Supervisor of the San Bernardino National Forest have not joined in the petition before this Court. (Page 2 of petition) Said Respondents obviously feel that if there was fraud and perjury as alleged herein, it should be heard and determined by the District Court rather than sidetracked by the abuse of legal process and legal technicalities which could take Respondent Doria ten more years to obtain a hearing thereon (providing Doria can continue to hold out and fight the injustice to them for ten more years).

Administrative Law Judge Graydon E. Holt ruled that Respondent Doria's 18 unpatented placer mining claims were null and void for *lack of discoveries of valuable mineral deposits.* While the State of California admitted at the Administrative Hearing that there was market for commercial and road building material in Victorville. some 16 miles away from the 18 Doria placer mining claims, Petitioners State of California have argued that the Doria material was worthless and hence not valid as valuable mineral deposits. The proof used by the petitioners at the Administrative Hearing was the testing results as spelled out in Exhibit 14A and testified to by the State's key witness, George A. Schroter.

After the hearing of Administrative Judge Holt, Respondent Doria discovered that the tests as shown by Exhibit 14A were fraudulent and that they were improperly conducted. Doria also learned by examination of Petitioner Calnev aerial photographs and aerial photographs of the United States Forest Service, all of which were taken of the Doria Placers *before, during* and *after* the construction of Highway Interstate 15, that the contractor hired by Petitioner State of California, mined and used more than 1,000,000 tons of road building material from Doria's 18 Placer Claims for the construction of Interstate Highway 15. Additionally Doria learned that the invitation for bids on the construction of the I-15 published by the State of California specifically required that all concrete aggregate materials which were to be used in said construction must come from Lytle Creek and Cleghorn some 12 to 18 miles south of the Doria placer claims.

The United States Court of Appeals, Ninth Circuit, after long and careful deliberation determined that Doria's allegations of fraud and perjury should be heard by the lower court so as to avoid injustice to Doria and furnish Doria a forum in which to have their day in court.

Petitioners herein clearly appear to be urging that the United States Court of Appeals did not know what they were talking about and misunderstood all the evidence and arguments regarding fraud and perjury that were made before them.

Petitioner desires to make any hearing on fraud and perjury moot by urging the United States Supreme Court, at this time, to review the decision of the United States Court of Appeals, Ninth Circuit, and reverse them. If certiorari is granted in this case, petitioners will avoid any confrontation with the fraud and perjury in the United States District Court, which court is the only forum where it can be heard. (See petitioners Appendix "A" page 8 footnote 6) Petitioner well knows that the United States Supreme Court will not grant a de novo hearing on the alleged fraud and perjury or make any determination whatever of the fraud issue.

Respondent Doria has already requested a rehearing on the fraud and perjury issues by the Department of Interior, which request and petition was denied on the grounds that it was up to the United States District Court to hear the matter. See Appendix "1" of this brief in opposition to certiorari which is a copy of Doria's petition for rehearing.

JURISDICTION ON WRIT OF CERTIORARI

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Respondent Doria respectfully submits that the "special and important reasons" urged by petitioners to this Court for a Writ of Certiorari are simply that "*continued litigation is needless and constitutes an unwarranted burden on the courts.*"

Petitioners are now seeking intervention by the United States Supreme Court in this case hoping to preclude Respondent Doria from having a forum in which to determine whether

fraud and perjury was used by petitioners which deprived Respondent Doria of valuable property rights. PETITIONERS HAVE ALREADY CAUSED MORE LITIGATION AND BURDENS ON THE COURTS BY THEIR MOTIONS AND APPEAL TO THIS COURT THAN IF THEY WOULD HAVE LET UNITED STATES DISTRICT COURT JUDGE WHELAN HEAR THE FRAUD AND PERJURY.

QUESTIONS PRESENTED

Petitioners raise two questions in their Petition for Writ of Certiorari. Both of these questions simply boil down to the allegation that Respondent Doria's 18 forty acre placer claims should be declared null and void because the administrative record reveals that there was no "discovery of valuable minerals" by the locaters of said placer claims. The "discovery of valuable minerals" is essential in order for Doria to prevail in a validity contest such as was brought here by petitioners.

In both of these questions presented, petitioner assumes fraud for the sake of argument, and then goes on to state that if such fraud were disregarded, the administrative record as a whole was not sufficient to show that such placer claims were valid because there were no valuable mineral deposits discovered.

However, once they assume, even for argument purposes, that the fraudulent evidence and perjury is disregarded, who is to say that the whole raft of evidence which petitioner claims "as a whole reveals no discovery of valuable minerals", was not also tainted by fraud and perjury?

The United States Court of Appeals, Ninth Circuit felt that not just Exhibit 14A but all the allegations of Respondent Doria should be heard by Judge Whelan of the United States District Court regarding fraud and perjury. Fraud is like a cancer which affects the whole body. One cannot just remove a portion thereof and expect the balance to be unaffected.

ARGUMENT AGAINST PETITIONERS "REASONS FOR GRANTING THE WRIT"

On page 10 of the Petition, Petitioners urge that the Court of Appeals reached their conclusion without considering the record as a whole. This is absurd. The court stated at page 5 of their decision (Appendix "A" of this petition on page 5) as follows:

> "When however, the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the Administrative proceeding, we hold that the reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious."

The Court of Appeals in Doria considered the whole record before it and decided that (even though the main alleged newly discovered fraud and perjury related to the sample test results, Exhibit 14A) there were other items of evidence supported by fraud and perjury which certainly were such as to infect the Administrative Board's determination. The Court of Appeal cited the *Standard Oil Co. v. Montedison* case, 540 F. 2d 611 F.2d 1976) as instructive.

In the *Montedison* case, the United States District Court Judge believed that he was not empowered to consider an issue that had not been raised before the Administrative Board. Therefore, the United States District Court Judge denied plaintiffs' motion to amend on that ground. The United States Court of Appeals, Third Circuit, held contrary thereto and its ruling is cited by the Ninth Circuit in this case at page 6 of Petitioner's Appendix "A" as follows:

> "In appropriate circumstances the district court may, in [a Section 146] action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding."

Again with respect to the two questions here presented by petitioners, assuming arguendo that there was no fraud and perjury, or that the fraud that was practiced and the perjury which was committed was not directly responsible for the Administrative Law Judge's decision, the record nonetheless demonstrates evidence before the administrative tribunal regarding the "discovery of valuable minerals." Petitioners urge just the opposite, i.e. that no discovery was shown.

Besides Doria having put on sufficient evidence of "discovery" and "marketability" by their own witnesses, the Administrative Hearing record clearly shows that the petitioners proved Doria's placer claims were valid by their own witnesses. The testimony and evidence given by the State's witnesses Mr. Schroter, Mr. Twing and Mr. Hove proved *continuous marketability* from the date of discovery in 1953 to the date of the hearing in 1973. Then this marketability evidence was destroyed with a fraudulent sampling testing program, which test results were given with Exhibit 14A. The testing itself was done in a false and fraudulent manner so that the results as shown on Exhibit 14A would not show valuable minerals but rather worthless fill material.

Petitioners urge on page 16 of their petition that *"this is a case where a single set of test results embodied in a single document"* (Exh. 14A) is challenged by Doria. They then go on for 2 more pages (Pages 17 & 18) to argue that there was no marketability proven nor was there any demand for the Doria material. The Administrative record shows just the opposite. This fact was also seen by U.S. Court of Appeals, 9th Circuit, who obviously didn't buy petitioners' arguments.

When private validity contest R4873 was held in 1973, petitioners failed to put on their prima facie case required by law to show that the claims did not have continuous marketability. Quite to the contrary, the State's witnesses Mr. Schroter and Mr. Twing both testified and proved continuous marketability. Their testimony was that from the early 1950's through 1967, the Barstow deposits (located about 31 miles north of

Victorville) and the Oro Grande deposit (owned by Twing and about 6 miles north of Victorville) were the only two deposits of any importance supplying the Victorville markets during those years. Twing and Schroter also testified that the Doria deposits were 16 miles south of Victorville. Their own evidence and testimony shows that Twing's Oro Grande deposit had a 25 mile haulage advantage over the Barstow deposits and a ten mile haulage advantage over the Doria deposits to the Victorville markets. The evidence further shows that Twing's Oro Grande deposit did not put the Barstow deposits out of business with his 25 mile haulage advantage over the years of 1950 through 1967.

Accordingly, the Barstow deposits still were selling in Victorville. Meanwhile, the Doria deposits were sitting only 16 miles away from the market, making said Doria deposits 15 miles closer to the market than the Barstow deposits. Therefore, it would be impossible for Twing's Oro Grande deposit to put the Doria deposits out of business with only a 10 mile haulage advantage because there was good continuous marketability of the Doria deposits. This is precisely why the petitioners herein had to use a fraudulent sampling testing program to show the Doria deposits of sand and gravel as worthless material thereby destroying said marketability.

Therefore, for Petitioners to argue that there was no marketability for the Doria deposits is absurd. After all, if there is no market for the materials when dealing in common variety minerals, why would the State waste thousands of dollars with sampling and testing of the Doria placer materials that they couldn't sell? In other words, if Doria's placers were worthless materials and not good, why would petitioners have needed to use a false and fraudulent sampling and testing program to show they were no good? You don't test worthless materials. If it had been unmarketable and worthless, Owl Rock would not have taken a lease on the Doria property for 1,000,000 metric tons, and, Petitioners would not have used over

1,000,000 tons thereof to build I-15. Also, Petitioners would not have built the 1930 freeway out of the Doria materials as shown by Exhibit 17 of the Administrative Hearing exhibits.

The State's witness Mr. Ed Curtain testified that they were going to sink a 30 foot pit in Section 14 of Doria and mine approximately 300,000 tons of sand and gravel to make concrete aggregates for the I-15 and to make such concrete aggregates out of pit run material without water or processing. (Exhibit 23 of Administrative Hearing). This impeached Mr. Schroter's testimony regarding Exhibit 14A test results which showed the Doria materials as worthless.

The State's witness George Twing testified that he never went on the Doria placer claims to evaluate them but he testified from the test results of Exhibit 14A to base his marketability testimony on.

The State's witness Robert Hove testified that he took one sample from the Doria placer claims (Exhibit 25) and had it tested. He said he could not remember whether the sample had the clay and the fines taken out of it. Administrative law Judge Holt said he could not give any weight to Hove's testimony if Hove did not know whether he took the clay or fines out before testing.

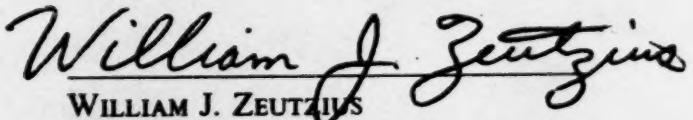
From the foregoing evidence of Mr. Curtain, marketability and good quality materials were proven. It did not, as petitioners contend, show worthless materials.

Mr. Hove also supplied Exhibit 24 which was a mine map of the placer deposits showing in red ink the location of the water well.

CONCLUSION

It is respectfully submitted that Petitioners request for a Writ of Certiorari should be denied and that a hearing in the U.S. District Court on the fraud and perjury, which went to the very core of the Administrative Agency decision, should proceed as ordered by the U.S. Court of Appeals, 9th Circuit, without further delays.

Respectfully submitted,



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PETITION ON BEHALF OF

DORIA MINING AND ENGINEERING CORPORATION

TO THE

SECRETARY OF THE INTERIOR

FOR A REHEARING OF VALIDITY CONTEST R-4873

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May 5, 1978

APPENDIX 1

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PETITION

TO: CECIL D. ANDRUS, Secretary of the
United States Department of Interior

FROM: Doria Mining and Engineering Corporation

RE: Request for Rehearing of Validity
Contest No. R-4873

This memorandum constitutes a petition, on behalf of Doria Mining and Engineering Corporation (hereafter "Doria") for a rehearing of validity contest R-4873. This petition is based on the fact that newly discovered evidence uncovered by Doria in state court inverse condemnation and trespass actions against the State of California, CalNev Pipeline Corporation (hereinafter "CalNev") and the Vinnel Corporation (hereafter "Vinnell")*/ shows that the core testimony upon which the Administrative Law Judge (ALJ) and the Interior Board of Land Appeals (IBLA) based their decisions adverse to Doria was false, misleading and inaccurate. The deficiencies in this testimony are so severe and the unfairness perpetrated upon Doria by the contestants is so extreme as to undermine the integrity of the entire administrative fact-finding process. Absent the tainted

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*/ These cases are Doria Mining and Engineering Corporation, et al. v. State of California, et al., No. 152504, Superior Court of the State of California for the County of San Bernardino; and Doria Mining and Engineering Corporation v. Vinnell Corporation, No. CW-8728, Superior Court of the State of California for the County of San Bernardino (Vinnell was the prime contractor for the construction of Interstate 15).

evidence introduced by contestants, there is no basis, substantial or otherwise, to support the IBLA decision. For these reasons, and as is more fully developed below, the case should be reheard.

1. The Secretary of the Interior Has Full Discretion to Reopen a Hearing at any Time.

The Department of the Interior (DOI) has created a review and appeal procedure that provides recourse from the decisions of its administrative law judges. Within this system, the determination of a board of appeals (in this case the Board of Land Appeals) is final, except for the power of a Board to reopen its proceedings [43 CFR 4.21(c)], and the power of the Secretary to conduct a further review of the Board's action. [43 CFR 4.5].*/

Although the fact situations where the Secretary has exercised his discretion to reopen proceedings vary, among the most typical cases have been those where error or fraud was committed at the hearing level. This principle

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*/ 43 CFR 4.1 provides that the Office of Hearings and Appeals "is an authorized representative of the Secretary." Section 4.5 specifies that "nothing in this part shall be construed to deprive the Secretary of any powers conferred upon him by Law." This provision has generally been construed by OHA and by the Secretary as reserving to the Secretary part of the power originally conferred on him by the Congress, i.e., the power to decide for himself cases on appeal at any stage of the proceedings, including reconsideration of the Board's final decision.

was stated succinctly in R.M. Barton 7 IBLA 230, September 12, 1972:

> "He [The Secretary] will not blindly or inflexibly adhere to prior decisions and stands ready to correct error, even if it be of long standing..."*/

In the present case, Doria requested the IBLA to reopen the hearing shortly after its decision was rendered. Doria asserted that it had acquired new evidence showing that materials from its claims were actually used to construct Interstate Highway #15 during the period 1968-1970. The new evidence would not only have established that markets existed for the Doria material; it would have also shown the duplicitous conduct of the State. This request was denied, because the Board erroneously concluded that even if Doria could establish a limited highway market for its material, it could not prevail in showing that it had made a valid discovery.

Similarly, in late 1975 and early 1976, a second request by Doria for reopening of the DOI hearing was denied, this time on the grounds that the matter was pending before the federal court (Letter of January 4, 1976 from James Muir to Undersecretary Kent Frizell of the Department of the Interior, and Frizell's response of January 23, 1977. Doria

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*/ In this case the Board found that the appellant had failed to present any new arguments to show that error had been committed in the earlier decisions; however, its statement of the law has been followed in other cases.

had filed its complaint appealing the DOI decision on March 10, 1975). Interior seems clearly to have taken the position prior to the filing of the Doria appeal that it would not reopen the case on its own, and thereafter, it would do so only in response to a court order. The district court, on the other hand, stated that it considered the case appropriate for remand but erroneously concluded that it lacked the power to send it back to the agency.

As Doria's Reply Brief filed before the Ninth Circuit makes abundantly clear, the district court had full authority to send the case back at any stage of the proceeding.

It is hornbook law that a court sitting in review of a ruling of an administrative agency is vested with full equity powers that permit it to tailor its relief to the exigencies of the case in order to insure a just result. Indiana and Michigan Electric Company v. Federal Power Commission, 502 F.2d 336 (D.C. Cir. 1974). Moreover, the power to remand a case to the agency for further proceedings has been held to be implicit in the court's reviewing power, as established under the Administrative Procedure Act (APA). Secretary of Labor of the United States v. Farino, 490 F.2d 885 (7th Cir. 1973). The guiding purpose of remand under

judicial review is "consonant with that of the administrative procedure itself -- to secure a just result with a minimum of technical requirements." Ford Motor Company v. National Labor Relations Board, 305 U.S. 364, 373 (1939).

Remand is particularly appropriate where the state of the record may preclude a just result. Fleming v. Federal Communications Commission, 225 F.2d 523, 526 (D.C. Cir. 1955). It has frequently been ordered when circumstances arise after the issuance of an administrative decision that may affect the propriety of that decision. National Labor Relations Board v. Jones and Laughlin Steel Corporation, 331 U.S. 416-428, See Fleming, supra, at 526. The fact situations where remand has been deemed particularly appropriate correspond closely to the circumstances in this case. In Greater Boston Television Corporation v. Federal Communications Commission, supra, the court stated:

> "The clearest case for remand appears when there is an allegation of impropriety comparable to a charge of fraud upon the agency... This court's decisions in various cases also reflect a doctrine where there has been a change in circumstances, subsequent to administrative decision and prior to court decision, that is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case." (Emphasis added.) (Id., at 283.)

In short, it is abundantly clear that the DOI could have reopened the hearing at any point up to and

until the federal court assumed jurisdiction: thereafter, the court was empowered to effect a remand either on its own initiative or in response to a request from Doria. At present, DOI can reopen the hearing if the Court of Appeals orders it to do so or, if the Court permits Doria to withdraw or stay its appeal. In the latter case, the Secretary can exercise his discretion to reopen. This petition seeks to obtain a commitment from the Secretary that he will exercise that discretion if the Court of Appeals relinquishes jurisdiction; if the Secretary agrees, Doria will take immediate steps to withdraw its appeal or to secure a stay pending DOI review. The Secretary's grant of this petition will save Doria a significant amount of time and money */ and will correct serious past injustices.

2. This Case Fully Merits A Rehearing

The history of this case is that of a continuing miscarriage of justice. Simply put, the predecessors in interest to appellant Doria Mining and Engineering Corporation,

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*/ The Court of Appeals has not yet scheduled oral argument in the case; once it does, months will pass before a decision is rendered. Further, it is entirely possible that the Court of Appeals will remand to the District Court because of the limited record developed below. Altogether as much as two years could pass before the same result is achieved as Doria is seeking in this Petition.

located 18 placer claims in the San Bernardino Valley during 1953 and 1955. Because of their inexperience and lack of business acumen, these claimants, while investing thousands of dollars in the claims, were unable, prior to the late 1960's to begin production of sand and gravel and the other common variety minerals contained on the property. In the late 1960's, the situation began to improve with the creation of Doria and the initiation by it of determined efforts to move into production. */ However, coincident with the creation of Doria, the series of events occurred that eventually undermined Doria's property rights and resulted in this litigation.

In 1961, 1968 and 1970, the State of California and CalNev obtained easement and use permits to traverse the property on which the Doria claims were located for the

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*/ The owners of the claims made several and repeated efforts to move them to production. The mining property tax statements of 1960 and 1961, for example, show that the owners had stockpiled 2,000-3,000 yards of material respectively (Exhibit No. 1). The purpose of the stockpiling was to pursue development of the materials. Similarly, during 1964, the individual property owners negotiated with Owl Rock Co. for the development of the claims. An option contract was signed whereby Owl Rock agreed to attempt to sell the material on the local highway construction market. Doria believes that the reason Owl Rock did not succeed in its efforts is because of pressure put on it by the U.S. Forest Service. During 1964 and 1965, the property owners contracted with Mr. Omar McDonald, a purported mining expert, for development of the claims. McDonald misled the investors, costing them more than $100,000 and diverting them from actual production. In the late '60's, Mr. James Muir, the current President of Doria and an individual with extensive mining experience began consulting the owners. As a result of his efforts, the company was taking the necessary steps to begin production when it was stopped short by contestants' validity contest.

construction of an interstate highway and a pipeline. This construction was initiated and completed without any effort to obtain the approval of Doria. Thereafter, these same parties instituted a validity contest before the Department of Interior seeking to have Doria's claims declared worthless. This result was achieved with the issuance of the Administrative Law Judge's opinion on December 26, 1973, and with its affirmance by the Interior Board of Land Appeals on October 31, 1974.

The hearing conducted as part of that contest -- which has become the cornerstone of all subsequent rulings in this case -- was, at best, characterized by conflicting evidence. Doria produced witnesses with both practical and analytical backgrounds who testified that the 18 placer claims included feldspathic sand suitable for the manufacture of glass, as well as mica, fine aggregate, coarse aggregate and other materials. These witnesses testified that the tests they had conducted clearly established the existence of mines and advised additional testing and development work to determine the precise type of plant needed for the mining. Further, the Doria witnesses testified that: a combined production of sand and gravel and feldspathic sand was feasible for the claims, even though either product could be profitably marketed by itself; that there were more than adequate markets in the area for the Doria materials, including

local building markets as well as highway construction projects, that would insure the profitability of the undertaking; and that an adequate supply of water existed to sustain the processing of the sand and gravel.

The State and CalNev, for their part, relied principally on the testimony of G. Austin Schroter (whose testimony comprised over 250 pages of the hearing transcript). Schroter testified, in summary, that the material from the Doria properties that he had tested was so substandard as to render it unmarketable, and that, in his opinion, the owners would be imprudent to invest any additional funds in the development of their claims. Schroter's testimony as to the quality of the Doria materials relied almost exclusively on laboratory tests conducted by the San Bernardino District 08 Materials Laboratory of the State of California (hereafter frequently referred to as the state testing lab), on samples taken by Schroter from the Doria properties.

A second witness for the contestants, who testified concerning marketability, based his conclusions as to product quality on the Schroter test data. Two other minor witnesses reinforced the Schroter conclusions, but could not have stood on their own as establishing a case of no discovery or no validity. In regard to the question of the availability of water, the contestants failed to rebut Doria's case.

The hearing resulted in a conclusory, largely unsubstantiated decision adverse to Doria. From the date of this decision until the present, Doria has persistently attempted to have that decision overturned but has met with a series of procedural irregularities and due process violations that threaten the integrity of the federal administrative review and appeal process. These include the following:

• A key question relating to marketability in the hearing (and one that the ALJ had raised), was whether or not the highway projects conducted during the period 1953-1975 in the area of Doria's claims could have or did use materials from those or adjacent claims; when Doria requested the IBLA to reopen the hearing to admit evidence showing not only that such a market existed but that materials from Doria had been used to build the highways, this request was flatly denied.

• When Mr. James Muir, one of the principals of Doria, became suspicious that the testimony submitted by Schroter, as well as the test results upon which it was based, were fraudulent or grossly inaccurate, he requested the DOI to conduct a rehearing in the case (a course of action fully within the DOI's competence)*/; but this opportunity, too, was denied. (Correspondence

*/ See 43 CFR, Sec. 4.21(c) and Sec. 4.5.

of December 1975 - February 1976 between Muir and DOI officials appended to Plaintiff's Notice of Motion to Supplement the Record, etc., May 26, 1976).

• Most significant of all, when, as the result of lengthy and complicated depositions conducted by Doria attorneys in a state inverse condemnation suit against the State and CalNev,*/ it was specifically demonstrated that Schroter had lied or distorted crucial facts pertaining to his sampling and testing procedures and that, further, this deception had been glossed over or validated by the state testing laboratory, Doria moved to amend its complaint in the District Court. This effort to amend, even though it put into question the validity of the central core of the contestants' case (and the main basis of the ALJ's decision), was vacated without opinion, explanation or review. (Plaintiff's Notice of Motion to Amend the Complaint ... and accompanying documents, April 26, 1976, and the Court's Notice of Vacating and Hearing on the Motion.)

• Similarly, Doria's efforts to stay the District Court proceedings pending a remand to the DOI for consideration of new evidence (and evaluation of the now tainted

*/ Doria Mining and Engineering Corporation, et al. v. State of California, et al., No. 152504, Superior Court of the State of California for the County of San Bernardino.

prior evidence) or, in the alternative, to enlarge the record before the District Court, were denied without explanation. (Plaintiff's May 25, 1976, Notice of Motion, supra.) Doria's last ditch effort to obtain relief from the court, through the filing of a Rule 60(b) motion for relief from a judgment based on erroneous or false evidence, was also rejected. (Plaintiff's 60(b) Motion, October 29, 1976.)

In short, Doria exercised every procedural option available to it to bring to the attention of the DOI and the District Court the newly discovered evidence obtained through the state court proceedings. At the very least, Doria established in its various pleadings that the newly discovered evidence seriously undermined the integrity of the DOI administrative fact-finding process and that, given that uncertainty, it was seriously questionable whether the agency had achieved a just result. Under these circumstances, the District Court was obligated to remand the case to the DOI to determine the weight to be accorded the original Schroter testimony in light of the new evidence and to reassess the competing claims of the two parties. The court's repeated refusal to provide this relief constitutes reversible error. Although Doria believes that the Court of Appeals will eventually correct the error of

the District Court and order a rehearing, it is hereby requesting the Secretary to avoid the lengthy delays inherent in that process and to commit the Department to a hearing immediately.

None of the arguments raised by defendants in the court proceedings is a proper bar to rehearing. Defendants attempted to distort Doria's request for remand by characterizing it as a demand for a trial de novo or a collateral attack on the administrative proceedings; they argued that Doria's attempt to amend its complaint because of newly discovered evidence was too late (Doria either did or should have known all the facts it alleged at a much earlier date). They contest the grounds for amendment by denying that there was fraudulent or erroneous testing; they argue that there was no fraud because the allegedly defective evidence was not intended to mislead; and finally, they argue that even if some of the evidence introduced by the defendants and relied upon by the DOI and the District Court was fraudulent or distorted, Doria should lose in any event because it failed to present an adequate affirmative case to show that it had made a valuable discovery of common variety or other minerals.

Doria's response to defendants' contentions, as is more fully developed below, is simple. The DOI clearly found defendants' testimony and evidence at the administrative hearing more compelling than the case presented by Doria; in deciding for defendants, it interpreted the evidence presented

Hazen test results and the related testimony introduced by Doria which showed the Doria materials to be well within industry standards. However, the ALJ accepted Schroter's testimony as controlling, apparently because of the aura of official confirmation (i.e., the work of the state labs) surrounding his work.

Besides testifying to the quality of the materials, Schroter offered extensive testimony to show that there were no available markets for the Doria materials. The contestant relied upon him to establish that Doria materials had not bee used for the construction of either Highway 31 in 1954-1955 (Tr. 161) or Interstate 15 in 1968-1970. (Tr. 96.) In regard to the former, Schroter stated that he had examined the soil sheets or test sheets maintained by District 8 and that they "all indicated that it (the material) was unsuitable." (Tr. 161.)

The contestants also relied on Schroter to establish that there were no markets in the Victorville and San Bernardino areas for the Doria products. On that subject, Schroter indicated that he had conducted a study of the existing markets and the available sources of supply and had concluded that the Doria products would not have a market. (Tr. 200-220.) Based on interviews with potential purchasers, Schroter stated that many of

them were too distant from the Doria claims,*/ that the Doria materials were inferior and that there was no interest in a new commercial source.

Schroter's testimony on available markets was both inaccurate (see footnote at the bottom of this page) and insubstantial. When questioned concerning haulage distance to some of the potential markets, Schroter revealed a somewhat cavalier attitude toward his marketing study:

> Q. What mileage did you assume would be an appropriate haulage distance for this straight territory area?
>
> A. I didn't assume any distance would be an appropriate haulage distance, because there is nothing commercial to haul.

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*/ Schroter's testimony in this regard was significantly inaccurate. In attempting to show that Barstow area plants would have served Victorville better than Doria because of haulage advantages, he testified as follows: Q. "Would the Barstow plants have also served the Victorville trade area?" A. "Yes, sir." Q. "How far is Barstow from Victorville?" A. "Well, I'd have to guess. In order of a magnitude of about 15 miles." (Tr. 206.) A check of the area road map shows Barstow is about 31 miles north of Victorville. Appellant is 16 miles from Victorville (Tr. 359.) A number of Doria's competitors work out of Barstow which is 31 miles from the market. If an extensive study was made as Mr. Schroter testified, he should at least have known the distance from one large city market to the other.

by Doria in light of that decision. The key element of defendants' presentation - and those expressly relied upon by the IBLA and the ALJ -- were the test results and related evidence produced by Schroter. As Doria attempted to demonstrate to the court below, it has since discovered evidence that shows Schroter's testimony to be contradictory, incomplete, inaccurate and probably fraudulent. This newly discovered evidence taints all of the evidence introduced by contestants and totally undermines the administrative decision in favor of California and CalNev. It clearly requires a new hearing. Absent the challenged evidence there is no "substantial basis" for the DOI decision.

Doria considers defendants' arguments that they should prevail even if the challenged testimony by Schroter and the related testimony based on his tests is removed, to be frivolous; however, if this approach is adopted, it is clear that Doria presented ample evidence during the DOI hearing to demonstrate the value and marketability of its claims.

A. Factual Background:

The basic issue underlying these entire proceedings is whether Doria had a valid mining claim, that is whether a valuable mineral deposit had been discovered on its claims as of July 23, 1955. The standard to be applied in reaching this decision has been described as follows: A discovery exists

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine... Castle v. Wombie, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

As noted above, Doria contends that the evidence it introduced before the DOI ALJ was sufficient to establish such a discovery. The following is a brief summation of those portions of Doria's case, as reflected in the administrative record, that established the validity of Doria's discovery.

(i) The Doria Case. No production or actual mining has occurred on the Doria claims; however, substantial testing and investigatory work has been undertaken (Tr. 496-1069). Because no significant changes occur over the years in sand and gravel deposits (Tr. 92), the tests conducted by Doria in the '60's and '70's provide a valid indication of the value of the claims at the time of location in 1953 and 1955. Primary elements in establishing a discovery are: the quality of the materials, their accessibility to profitable markets and the availability of water for processing purposes (Tr. 329). It was established beyond question that a suitable supply of water existed for the Doria claims in a hidden well that has been closed off by one of the owners. (Tr. pp. 554-566, 1007-1012).*/

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*/ The ALJ acknowledged this point, stating to Doria's attorney: "Well, you have established that there was water in the area. Now the Government will have to come up with something to refute that information and, obviously, they don't have any witnesses for that purpose." (Tr. p. 1012). No refutation was made by the Government on the record.

In regard to the quality of the materials on the Doria claims, two witnesses (Myertons and Muir, Tr. 815-993 and Tr. 994-1179) testified for Doria concerning the quality of the sand and gravel and related materials on the property; and one witness (Billings, Tr. 685-815), addressed himself to the quality of the feldspathic sand. Billings, a glass expert, testified that either a plant producing feldspathic sand alone or one producing such sand in conjunction with a sand and gravel operation would be profitable. He testified that the Doria feldspathic sand was of a quality that could be used in the glass industry (Tr. 622), that it was competitive with existing markets both in 1955 and at present (Tr. 635-637). Billings recommended that the claimants move ahead to production and indicated that the next step would be the performance of additional tests, prior to investment in the processing plant. (Tr. 642).

Myertons testified that the Doria materials were fairly consistent throughout the claims.*/ He stated unequivocably that it is technically feasible to produce a range of products from the Doria materials including

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*/ The Hazen Research group took two large (120 gallon samples) from two claims reaching a depth of 25 feet on each (Tr. 499-515). This was done after they had determined on the basis of smaller (5 gallons) samples, taken from each of the other 16 claims, that the materials were generally homogenous. Although the contestants challenged the limited number of 120 gallon samples taken by Hazen, their chief witness, Schroter, repeatedly conceded that the claims were homogenous. (Tr. 239, 306).

feldspathic sand, mica, magnetic, fine aggregate and coarse aggregate. Myertons concluded that his test results had been sufficient to establish that a prudent man would proceed with production. (Tr. 850, 853-854). Myertons also testified that he would advise further testing, but that this would go to the specifics of the plant and production methods, not to a determination of whether or not there was a valuable discovery. The exchange on this issue was as follows:

> Q. Mr. Myertons, in connection with the questions and answers put and given in connection with the testing that was done of the samples, you indicated that had there been more time and at a farther stage of the testing prior to plant design, you would recommend that all 16 samples be tested. Is that a fair summary of your statement yesterday?
>
> A. Yes, I believe so.
>
> Q. Why, for what purpose?
>
> A. Testing of a larger number of samples would give us a better measure of the variance that one might expect in the feed material to be treated by the plant. Therefore, we would expect that the design engineers would have a better foundation on which to select the size of the individual pieces of equipment which might go into that plant; and this, again, would be normal, prudent practice in the course of a process development and the course of designing a particular plant.
>
> Q. Is it then your testimony that the additional testing of the samples already taken is related not to the question whether or not there is a mine, but as to the type of plant that would be designed to mine it?
>
> A. That would be my purpose, sir. (Tr. p. 975.)

Mr. Muir testified, based on his inspection of the property and his review of assays and other analyses performed on the property, that a 1.2 million dollar plant would be feasible and profitable on the property. (Tr. 1021; 1060.) Muir also testified that he had conducted a marketability study that demonstrated a demand for the Doria materials in both public and private markets. Among other things, Muir indicated that significant markets existed in 1953-1955 for the construction of Interstate 15 (Tr. 1069-1070). As noted above, further evidence concerning marketability was provided in regard to feldspathic sand by Billings.

In addition to the oral testimony of witnesses at the DOI hearing, Doria has compiled documentary evidence demonstrating the value of its claims. At the DOI hearing, Doria introduced detailed test results and analyses prepared by Hazen Research, Inc. and Western Testing Laboratories showing that the materials on the claims were more than adequate to meet industry standards (See Enclosure 2 and Exhibit G, Tr. 1205 R-4873). Another key document is the U.S. Geological Survey Mapping conducted for DOI by T.W. Dibblee, Jr. in 1956 and 1958 (this was introduced as an exhibit to the hearing by contestants, Tr. 91, 116). The Dibblee mapping covers the area where the Doria placer claims are located. It indicates that the predominant geological formations of

the area are: QA -- quantinary alluvium; QSG -- quantinary sand and gravel; and TC -- tertiary conglomerate -- sand and gravel. Official California state publications indicate that in the Southern part of the state, QA is the predominant geological deposit mined for sand and gravel aggregate purposes;*/ QSG and TC also constitute materials of high demand for commercial sand and gravel operations.

The third key document is the Materials Report for the proposed construction of State Highway 31 issued May 25, 1951 by the California Division of Highways (Enclosure 3). That report states that materials in the area of the placer claims were found adequate for construction of the proposed highway (pp. 4-9). The report further states that the present road, built in 1930, utilized materials from the area encompassed by Doria's claims and that these materials were highly durable.**/

A fourth important source of documentary evidence are the topographical maps created by computer from aerial photographs showing that during the years 1969-1970, the Vinnell Corporation, a subcontractor of the California

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*/ See Doria v. Vinnell, supra, Plaintiffs' Points and Authorities in Opposition to Demurrer, at p. 3, October 15, 1974.

**/ Specifically, the report stated: "Though the existing surfacing shows some signs of cracking and drying out, it is still in good condition, especially considering its age and the volume of traffic it has carried since its construction. As compared with the cost of maintenance for similar types of pavements in the district, the upkeep of the travelled way on this way has been very low."

Division of Highways, took more than one million tons of material from the Doria property for use in the construction of the Interstate 15 Freeway. The photos were taken by CalNev and the U.S. Forest Service both before and after excavations. Enlarged, they show large pits left on the Doria properties after the mining.*/

In short, the evidence introduced before the ALJ during the 1973 hearing, whether or not supplemented with subsequently discovered evidence, clearly shows that the ALJ and the IBLA erred in concluding that Doria's placer claims were invalid. This conclusion becomes irrefutable when the evidence developed in the State court proceedings, showing that Schroter introduced fraudulent and defective testimony into the DOI hearing to undercut Doria's case, is taken into consideration. The post-hearing discoveries concerning the Schroter testimony totally undermine the basis of the DOI decision; they show that the decision could not have been based "on substantial evidence" and that the District Court erred in upholding it.

(ii) Contestants' Case and Its Subsequent Undermining. The State of California and CalNev in contesting the validity of Doria's claims introduced four witnesses whose testimony totalled 404 transcript pages. Of these Schroter accounted for over half, or 254 pages. Thwing, the contestants' chief expert as to marketability, accounted for 117

*/ See Doria v. Vinnell, supra, Plaintiffs Points and Authorities in Opposition to Demurrer, at p. 3 October 15, 1974.

pages; his assessment of the value of the claims and the impact of value on marketability was based exclusively on the test data compiled by Schroter (Tr. 32, 345-346, 17 IBLA 380, at 391). The testimony of the remaining two witnesses, Curtin and Hove, accounted for 22 and 18 pages respectively, or only a negligible aspect of the contestants' case. Much of Hove's testimony went to the quality of the materials, based on samples he had tested at the CHJ labs. Hove did not have the underlying test data and did not know if one of the key tests had been conducted with or without clay conglomerates. The ALJ agreed to leave Hove's test results in the record but indicated that he could not give much weight to them. (Tr. 488.)

The heavy reliance by the contestants on Schroter and the volume of his testimony is only part of the story.*/ More important is the fact that both the IBLA and the District Court based their decisions against Doria principally on Schroter's evidence. The IBLA decision gave a two-page, detailed, summary of the Schroter testimony and evidence, concluding that "The test results indicated that

*/ In addition, in its answer to the complaint in federal court, defendant, State of California, averred that the administrative decision "was supported by competent, substantial evidence adduced principally through the testimony of contestants' expert witnesses Messrs. Schroter and Thwing."

the material on the claims did not meet minimum specifications required for commercial aggregate in the industry*/ as of July 23, 1955, or for any period thereafter." The opinion also placed heavy reliance on "an extensive sand and gravel study" conducted by Schroter and concluded that there was no market for the materials. To buttress its overall decision the IBLA concluded as follows:

> "In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit. Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone, or in a sand and gravel operation combined with production of a valuable mineral by-product.

The District Court, for its part, in its Memorandum of Decision Granting Defendants' Motion for Summary

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*/ As is more fully developed below, this is a reference to the results of the L.A. Rattler test.

Judgment (September 28, 1976), relied principally on Schroter, rejecting the Doria claims to a valid sand and gravel discovery. The court stated as follows:

> In examining the record before the court, the evidence shows that the tests conducted by the government's expert, Mr. Austin Schroter, demonstrated the invalidity of the claims under either the marketability or the "prudent man" test... The tests show that there were no valuable mineral deposits in the area of Plaintiff's claims and that the sand and gravel present in the area did not satisfy specifications required for commercial aggregate, or common variety minerals as of July 23, 1955... Plaintiff is therefore limited to discovery of non-common or valuable minerals.*/

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*/ The ALJ and the IBLA, as well as the District Court, did not place heavy reliance on Schroter for their conclusion that Doria had not made a timely discovery of feldspathic sand, a non-common variety mineral. The final decision in this regard was based on a number of elements: the fact that Billings, Doria's chief witness on the subject, had testified that he would like to conduct additional tests before giving the go-ahead for an operational plant, the fact that the samples upon which Billings conducted his tests were limited to two of the claims and the fact that, according to the District Court's reading of mining law, the contestants' interests in the property vested prior to the time when Doria actually tested and prepared to develop the material, thereby removing it from location. Doria has set forth in detail the reasons why this decision is erroneous and not supported by the record in its pleadings in the district court and will not address the issue here. (See Doria's Opposition to Defendants' Motion for Summary Judgment, July 30, 1975, as well as Doria's May 26, 1976 Supplemental Reply to Defendants, December 10, 1975, Request..., which are incorporated herein by reference).

Because of the centrality of Schroter's testimony to the decision in this case, it is important to examine the assertions that he made on the hearing record.

Photographic and testimonial evidence produced by Schroter suggested that the sampling procedures that he follo on the Doria claims involved: the taking of a 10-12 foot deep back hoe cut of material (each approximately one ton) from each claim, the coning and quartering of each cut, followed by a second quartering to produce appropriate samples. Schroter never testified concerning the exact weight of each sample, but, by implication, each quarter weighed around 125 pounds. One of the quarters from each claim was screened and weighed on the ground to determine the sand/gravel ratio; one was submitted to the state testing laboratory for testing; one was retained for examination for precious metals and one was reserved as a "spare" for examination by any interested party. (Tr. 127-134.)

Schroter testified that he performed or had performed a series of three tests on the material including one to determine the sand/gravel ratio (he implied that two sets of sand/gravel ratio tests were performed, one in the field and one in the lab); one to determine the resistance of the material to abrasion (known as the L.A. Rattler test); and a test known as the "sand equivalent" test, intended to measure the amount of silt in the clay. (Tr. 135-136.

Schroter also described how the tests were performed and what standards the material had to meet to conform with both public and industry requirements. Apart from the tests that he conducted in the field, Schroter indicated that the bulk of the testing program was performed by the state testing lab. The performance of this lab as well as the requirements of each of the tests that it performed are regulated in detail by the State of California.

The results of all of Schroter's testing, whether performed directly by himself or by the laboratory, were presented in Contestants' Exhibit 14A (Tr. 139, Enclosure 4, attached hereto), which became the key exhibit for destroying Doria's claims. Based on Exhibit 14A, Schroter testified that, for the most part, the test results showed that the Doria claims did not meet minimum public and/or industry standards and, hence, were valueless.*/ (Tr. 139-140, 142). He concluded that for the period 1955 through the time of the hearing, "none of the samples passed, none of them at commercial standards of profitability, possible profitability." (Tr. 143.) These results were directly contradicted by the

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*/ Exhibit 14A, for example, shows the average sand/gravel ratio for the Doria claims to be 75/25, significantly higher in terms of sand content than the standard asserted by Schroter to be acceptable in the industry. Similarly, the Schroter results for the L.A. Rattler test averaged 56% loss at 500 revolutions, or roughly 6-14 percentage points above the 45-50% established by the ASTM. Doria's own test results in both instances showed that the materials conformed with industry standards.

Schroter's final conclusions were that, in his opinion, the Doria properties did not contain deposits "of interest to man in some commercial or industrial use" (Tr. 226) because there was no way to show a profit (Tr. 227). According to Schroter, a prudent man would not invest any additional funds in the development of the claims (Tr. 227-228).

The portion of Schroter's testimony carrying the most weight with the decision makers was that dealing with the quality of the Doria material. Although he also presented damaging testimony concerning the marketability of the material, his conclusions in that regard were derivative. In essence, Schroter testified that the materials were unmarketable because they were inferior.

Subsequent to the completion of the DOI hearing and the IBLA's review thereof, Schroter's testimony and the test data he produced have been shown to be totally inaccurate and/or fraudulent. Underlying evidence has been lost; the individuals involved in the testing program have repeatedly contradicted each other and newly discovered evidence has shown that the tests whose results were the exclusive basis for Schroter's testimony were so improperly performed as to require rejection of the results. In putting

forward such evidence, the State and CalNev worked a hardship upon an innocent private party and undermined the integrity of the administrative and judicial processes. For these reasons, a new hearing is required.

It was impossible for Doria to uncover the fraudulent nature of Schroter's testimony, particularly the test results, at the time of the hearing. The evidence he introduced was ostensibly validated by a state testing facility and there was no reason for Doria to doubt the integrity of that facility. In fact, Doria was able to unravel the shrouds concealing Schroter's conduct -- and that of the state materials testing laboratory -- only through the arduous, time-consuming and extensive discovery proceedings conducted in the state court litigation. The further that litigation has progressed, the more extensive has become the evidence of Schroter's duplicity.

The following is a summary of the key defects that Doria has uncovered in the Schroter testimony. It is necessarily technical and complicated, but there is no other way to establish the clear-cut grounds for reversal in this case.

(a) Improper Sampling of Materials

As noted above, Schroter's testimony during the course of the administrative hearing established that the

samples removed from the Doria claims for testing were extracted as follows:

- Backhoe cuts were made on the subject mining claims to a depth of 10 to 12 feet; materials from the cuts weighing approximately one ton were placed on a slick sheet and coned and quartered; each quarter was again cut in four.

- Approximately six inches to two feet of the 12-foot cuts consisted of an overburden containing significiant amounts of cobbles (Tr. 240-244).*/

- After coning and quartering the samples taken from the 10 to 12 foot cuts, each quarter was split into four equal parts for testing. One-quarter was designated for a sand and gravel ratio test in the field; one-quarter was designated for a noble mineral assay test; one-quarter for concrete aggregate testing in the state testing laboratory; and one-quarter was retained as a spare or hold sample for Doria or others to see and examine themselves. Mr. Schroter implied that each of individual samples ultimately sent to the State Lab for testing weighed roughly 125 pounds (2,000 pounds equals one ton, divided by four equals 500, divided equally into four parts equals 125 pounds) and each was of approximately the same composition and weight.

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*/ In support of this observation Mr. Schroter submitted numerous photographs in evidence showing a veneer of cobbles and boulders.

This testimony has subsequently been shown to be false. The samples were neither of the composition nor weight attested by Schroter. In the first place, the samples actually put through for testing included significantly fewer rock materials than are found in the tupical mix of materials located on the Doria claims. Schroter's testimony that approximately six inches to two feet of the 12-foot cuts contained an overburden that included significant amounts of cobbles was substantiated by numerous photographs and by his deposition testimony taken on May 16, 1975, wherein he indicated the existence of rocks "at least as large as cantaloupes." (Schroter Deposition, May 16, 1975, p. 101.) However, the test sheets maintained by the State Laboratory (see Enclosure 5) indicate in the upper lefthand section sheets, marked grading analysis, that only two samples had rocks as large as four inches; three others had rocks as large as three inches, and an additional sample included 2.3 inch material. In other words, less than half the samples included rock material.*/ As is more clearly demonstrated below, the absence of a representative level of rocks and boulders in the testing samples violated the test standards and rendered the entire procedure invalid.

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*/ This is hard to explain, given the repeated testimony of Schroter and others that the claims all included relatively homogenous material.

Secondly, the Schroter samples were all deficient in weight. At this stage in the proceedings, it is impossible to determine the true weights of the samples. Not only did Schroter "lose" his field notes, recording the sample weights (Schroter Deposition, March 6, 1977, pp. 10-11), but the State Laboratory destroyed that portion of the test sheet maintained on each sample that recorded the weight at time of testing (Claude Dean Pitts Deposition, April 23, 1976, pp. 50-53, Exhibit 5). Although the lab maintained a single sheet on each sample, with the weight recorded in designated columns on the back of the sheet, for some inexplicable reason, the original sheets were destroyed and only a xerox of the front portion of each sheet was maintained. Thus, there are no original records of the sample weights. This situation is compounded by the fact that Schroter, the lab technicians and others have testified under oath to such a variance of weights for the samples, that it is only possible to conjecture as to their true weights.

For example, at the DOI hearing, Schroter implied that each sample weighed 125 pounds. But in his May 16, 1975 deposition, he estimated that each sample varied in weight from 20 to 50 pounds. (Schroter Deposition, May 15, 1975, p. 81.) One year later, he again changed his testimony. In his affidavit of April 29, 1976 (Enclosure 6) Schroter stated that the weight of his samples ranged from 31 t 208 pounds, and "averaged 135 pounds a piece." Sainte-Claire,

the only man at the State Laboratory to test the samples, stated that the approximate weight of nine of the samples was only 20 to 25 pounds, and the remaining nine samples were only a little heavier than the first group. (Sainte-Claire Deposition, September 10, 1976, p. 49, 51-52.) Claude Dean Pitts, Sainte-Claire's supervisor, testified in April 1976 to weights ranging from 5.9 pounds to 45.5 pounds. (Affidavit of Robert Vidor, May 18, 1976 attaching list A sample weights from Pitts -- Enclosure 7) Finally, laboratory director Rundle testified to Schroter samples taken from Doria's "Mesquite" placer claim, that weighed only 10 to 18 pounds. According to Rundle, these samples were typical of all the others since all of the samples were supposed to be uniform. (Rundle Deposition, August 22, 1975 , pp. 9, 12, 15, 51, and 67.) In addition, belated testimony was introduced by Thomas DeVore, suggesting that the mixed sand and gravel samples taken from each claim were supplemented by additional bags containing only rock material from each claim. This testimony was contradicted by Schroter.

Despite the highly conflicting testimony and the fact that the original records reflecting the actual sample weights have been lost or destroyed, testimony on the record (in both the federal litigation and the state court cases) strongly suggests a pers sample weight of around 15-20 pounds, a clear violation of state law. The testimony supporting this conclusion is as follows:

At the administrative hearing R-4873 of April 26, 1973, Schroter introduced Exhibit 14A (Enclosure No. 4). Table 5 of that exhibit indicates the range of the sand to gravel ratio test results which Schroter observed at the time of the sampling of the claims in the field, and also the range of sand to gravel ratio results that were compiled by the State Lab and interpreted by them for him. The approximate average of the sand and gravel test results from Table 5 of Exhibit 14A is 75% sand to 25% gravel (note that the exclusion of cobbles and boulders from the samples alone should have disqualified the sand and gravel results obtained by Mr. Schroter). These averages applied to all of the samples since the samples were relatively homogenous.*/ They indicate that no samples were taken that consisted solely of rock material.

At his deposition of April 23, 1976, Claude Dean Pitts compiled the weights of each sample, then in the custody of the District 08 Lab in San Bernardino. This compilation was marked as Exhibit 4 for the purposes of that deposition (Enclosure 7 - see attachment). The range of weights of the samples recorded in Enclosure 7 is from 5.9 pounds to 45.5 pounds; all of the samples weighing over 40 pounds are designated as +4 materials only (and the remaining

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*/ Schroter testified that all four parts were roughly equal. Charles Russell Sainte-Claire, the tester of the materials, indicated that the weights of the two samples from each claim (test and spare samples) weighed approximately the same for each of the claims. And Thomas Rundle also testified that if samples are coned and quartered into four equal parts, they must all be about the same size and weight.

designated sd. and rock). However, Sainte-Claire, the individual who tested the material, indicated that he never received or observed samples from Schroter which contained only +4 mesh or gravel material. This suggests that the heaviest sample tested actually weighed only 34 pounds, making the average weight per sample approximately 14.2 pounds. Sainte-Claire later indicated that for samples No. 4-72-90 through 4-72-98 the approximate per sample weight was 20 to 25 pounds, while for samples 4-72-103 through 4-72-111 the per sample weight was a litter heavier but still too small for testing (Sainte-Claire Deposition, September 10, 1976).

These weight assessments are further confirmed by Mr. Robert W. Vidor's letter of October 24, 1975, setting forth the weights of the samples Mr. Rundle brought to his August deposition (Enclosure No. 8). The Vidor letter indicates the range of weight of the Rundle samples to be from 12.7 pounds to 25 pounds. These weights refer to the samples brought by Mr. Rundle to his August 22, 1975 deposition from the Mesquite claim.*/

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*/ Note that the data contained on test sheet No. 162 (the +4 mesh sample from the Mesquite claim showing a sample weight of 98.75) does not correspond to the weights indicated in Mr. Vidor's letter of August 22, 1975, Enclosure No. 7.

In short, the only way that the sample weights can be measured in excess of 25 pounds is if an entire set (one per claim) of samples containing only rock material (+4 mesh) is included; this device for upgrading the sample weights cannot be accepted, because Schroter denied ever taking such samples. The use of +4 mesh materials to supplement the sample weight appears to have been an afterthought, a step undoubtedly taken as a result of questions raised in the state and federal litigation suggesting that the testing program was invalid. The mysterious rock samples were first mentioned by Thomas DeVore, Schroter's associate in the field. DeVore suggested that a fifth sample was taken from each claim that contained material of a weight of 100 pounds (DeVore Deposition, June 4, 1976). This testimony was specifically contradicted by Schroter, Sainte-Claire, and Rundle and by DeVore's own prior testimony in the same deposition. Further, it flies in the face of the repeated testimony that 4 samples were taken from each claim and that each of these samples was roughly homogenous both in content and in weight. It should be disregarded for purposes of determining actual sample weights.*/

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*/ The contradictions concerning sample weights are not the only contradictions in the case. Schroter has even contradicted his own testimony concerning the method of sampling that he utilized. In his affidavit of April 29, 1976, filed in federal court (Enclosure 6) Schroter indicates that instead of being coned and quartered, the samples were decimated. Decimination, according to Schroter, is defined as taking one shovel full of material for waste and a second shovel full for the sample (Schroter Deposition, May 16, 1975, pp. 86, 87 and 88).

The deficiencies in the sample weights invalidate the tests performed on the samples, thereby undercutting all of Schroter's testimony concerning the quality of the materials. Worse, the deficiencies appear to have been deliberate and informed, rather than the result of inadvertence or misunderstanding. Not only was Schroter experienced in performing the kinds of sampling and testing involved and familiar with state lab requirements, but, in addition, he was specifically warned that the samples must meet specific weight requirements. Sainte-Claire testified on September 10, 1976, at pages 15-23 of his deposition, that prior to Schroter's sampling in the field, a meeting was set up with Mr. Schroter, Mr. Rundle, Mr. Pitts, and possibly Mr. Vidor present, wherein Sainte-Claire advised Schroter that for proper testing each of the samples must contain 40 to 50 pounds of rock, or +4 mesh material. At a later deposition Sainte-Claire indicated that he had advised Schroter that for samples containing 75% sand and 25% gravel, proper testing would require a total per sample weight of at least 160 to 200 pounds. This would be necessary to test 40 to 50 pounds of rock for the L.A. Rattler test. Schroter totally ignored Sainte-Claire's advice.

Given the deficiencies in the samples taken by Schroter from the Doria claims, there is no way that the tests performed on the samples could be valid or of any use in determining the quality of the materials on the

claims. The following discussion of problems associated with the testing procedures helps to illustrate this point.

(b) Improper Testing of Materials

• The Sand/Gravel Ratio Test:

Schroter testified and introduced test results in Exhibit 14A allegedly showing that the Doria materials contain too much sand in relation to their gravel content to be marketable. The figures introduced into Exhibit 14A showed an average sand/gravel ratio of 75%-25% for the claims in question. If the figures are correct, this means that the composition of the materials on each claim averaged 75% sand and 25% gravel, a percentage that Schroter claimed made the materials inappropriate for use by either the state or private commercial operations, because of the high sand content. Neither Schroter's figures nor his conclusions are correct.

In the first place, the standard asserted by Schroter, and apparently accepted by the ALJ, is not supported by the evidence. Sand and gravel having an even lesser percentage of gravel is commercially marketable; the major purpose of tests similar to the ones allegedly conducted by Schroter is not to determine marketability but rather to form a basis for decisions concerning the processing procedures required to make the materials

marketable. In the second place, Schroter performed the tests in a fashion that did not conform with state law and that consequently produced meaningless results. Had state law been adhered to, the sand/gravel ratio would have been closer to that produced by the Hazen report performed for Doria and introduced into evidence by it during the administrative hearing. That report showed the true sand/gravel ratio of the Doria materials to be 60/40 (60% sand and 40% gravel).

The only official test relevant to the determination of the sand and gravel content in claims such as Doria's is state test 202-G, a coarse and fine sieve analysis test (Enclsoure 9). The results of this test, which was actually performed by the state lab won the Doria materials, showed the materials to be substantially as determined by the Hazen report (see Enclosure 2). The test results reported by Schroter in the first two columns of Exhibit 14A either did not meet the requirements of 202-G, or may not have actually been performed. Thomas Rundle, the supervisor of the state lab, testified that he had never heard of a test similar to Schroter's "field" test. When questioned concerning this test, Rundle testified as follows:

> Q. "Do you know what a sand and gravel ratio test is?"
>
> A. "No, I described the sieve analysis test (202-G). Now, I am trying to say what I think sand and gravel ratio is, which we don't use in our business."

At page 46 of the same deposition:

Q. "I believe we talked a little bit about the sand and gravel ratio test and you weren't familiar with it by that name; is that correct?"

A. "No, I don't ... I have heard of such a test. I am not sure there is such a test."

Regardless of whether the sand/gravel tests performed by Schroter in the field were known in the industry, they were improperly performed. The basic defect was the inclusion in the sand of materials not generally regarded as sand, that is, waste materials and materials that would pass through a 200 mesh sieve. By including these materials, Schroter produced a distorted sand/gravel ratio that reflected an excessive percentage of sand. The inclusion of these materials violated industry standards as established by the American Society of Testing and Materials (ASTM). The ASTM standards specify that for similar or related tests, particles that fall below the minus 200 mesh sieve are not to be considered part of the sand product and should be eliminated from any sand measurements. (See, Mineral Commodities of California, Bulletin 176, dated December, 1957, pp. 495, 501, Enclosure 10).

The results of the tests reportedly performed in the lab to determine the relative sand/gravel content of the materials (reported in Column 2) cannot

be explained. They differ from the results of the 202-G test reported on the test sheets (which were not made available until some time after the DOI hearing when they were discovered as part of the state court litigation). These results appear to have been fabricated by Schroter as a means of substantiating his field test results.*/ In any event, whatever their derivation, the results represented by Schroter in regard to sand/gravel ratios are incorrect and misleading.

● The L.A. Rattler Test

The L.A. Rattler test, designated by state regulation as Test 211-D, is a test to determine the amount and degree of abrasion of certain aggregate sizes, which relates to their suitability for concrete aggregate or high grade products. According to Schroter, an appropriate test result for commerical purposes (as determined by ASTM) is 50% loss at 500 revolutions. For asphaltic concrete,

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*/ It should be noted that to properly perform the 202-G test, state regulations provide that if a sample submitted for testing contains particles of two and one-half inches in size -- as did many of the Schroter samples (see Test Sheets Nos. 4-72-95, 4-72-97, 4-72-103, 4-72-107 and 5-72-160) -- it must include 55 pounds of rock (or 25,000 grams). For material that is 75% sand and 25% gravel (as Schroter claimed Doria's is), the total sample weight must be 220 pounds (Pitts Deposition, April 23, 1976, p. 79-80). The test sheets reveal that none of the samples weighed 55 pounds, much less 220 pounds.

the requirements are 10% loss at 100 revolutions and 45% loss at 500 revolutions. The Hazen Report introduced by Doria into evidence at the DOI hearing rated the Doria materials (when properly processed) as between 41.3 and 45.5%, fully within the ASTM standards (Tr. 1205).*/ The Schroter test result , on the other hand, as reflected in Exhibit 14A showed an average of 56%, somewhat out of line with industry standards.

The ALJ placed heavy reliance on the L.A. Rattler test results in reaching the conclusion that the Doria materials were not of sufficient quality to be marketable. This reliance was misguided. As subsequent discovery has uncovered, the size of the samples put through the L.A. Rattler test were deficient both in content (cobbles and boulders were not included) and in weight.

Enclosure No. 11 describes the test methodology for the L.A. Rattler test.**/ A "charge or feed of 11 pounds (2.75 pounds for each of the range of four sizes indicated) is placed in the L.A. Rattler machine to determin

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*/ Myertons, Doria's expert, commented on the results as follows: "I would interpret this as indicating it has passed the test on both counts (state and ASTM specifications)." (Tr. 1211.)

**/ The aggregate sizes included in the test are: those materials passing the 1-1/2 inch and retained on the 1 inch sieves; those materials passing the 1 inch, and retained on the 3/4 inch sieves; those materials passing the 3/4 inch and retained on the 1/2 inch sieve and those materials passing the 1/2 inch and retained o the 3/8 inch sieves.

the resistance of coarse aggregate to impact in a rotating cylinder containing metallic spheres. The resultant "percentage of wear" is arrived at by dividing the weight of the original test specimen minus the weight retained on the No. 12 sieve after the specified number of revolutions by the original weight.

The weights required for samples to be subjected to the L.A. Rattler test are listed in California Test Method 202-G (Enclosure 9), which specifies the procedures for determining the particle size distribution of fine and coarse aggregate (See Enclosure 9). Table No. 1 of 202-G specifies the minimum sample weight necessary for any coarse aggregate material submitted for testing. If the sample submitted for the L.A. Rattler test has individual particles in it of up to 2-1/2 inches, then 25,000 grams or 55 pounds of +4 mesh materials must be introduced prior to producing the 11 pound "charge" necessary for the L.A. Rattler test. This means that in regard to samples with a 75/25 sand to gravel ration, there must be at least 55 pounds of rock or +4 mesh material, for a total sample weight of 220 pounds.

From the testimony previously discussed above, and from a close perusal of the 23 test sheets obtained in the state court proceedings (Enclosure No. 5), it is evident that the State of California violated its own testing procedures in the conduct of the L.A. Rattler test. This Memorandum has previously shown that the individual samples taken to the lab

for testing averaged around twenty pounds each. This means that even those samples that contained no material of 2.5 mesh or more were underweight. The samples that did contain such materials (as is indicated on a number of the test sheets) were ten times too small in terms of weight.

Testimony has been taken since the DOI hearing suggesting that in order to correct the weight deficiencies, the test samples were combined into two sets of nine each and that these in turn may have been combined into a single big sample for testing (Sainte-Claire Deposition, September 10, 1976) but this testimony has been so contradicted as to be unbelievable.*/

The conflicting testimony is as follows: Sainte-Claire stated that he was told by his supervisors to composite the individual samples numbered 4-72-90 through 4-72-98 because they were too small to meet the test standards (Sainte-Claire Deposition, September 10, 1976). He subsequently reported back to his supervisors that even after compositing the nine samples there was insufficient material to meet the state standards. He was then instructed to correct this deficiency by throwing

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*/ The test sheets themselves reflect that two samples were created for testing by compositing nine of the Doria samples for each of the two. This, according to the Pitts Deposition, was written by him on the test sheets, although he had no knowledge of the compositing. Sainte-Claire, on the other hand, testified that he tested some individual samples plus combinations that resulted from compositing three samples and then joining them with "hold" or "spare" samples. There is no way of getting under this conflict, but it is clear that, regardless of what testimony is accepted, the tests were inadequate because the samples tested did not have sufficient rocks and cobbles and because they were deficient in weight.

in all of the "hold" samples, thereby effectively doubling the weight of the samples brought by Schroter to the lab for testing.

The suggesting that the spare samples were combined with the hold samples is contradicted by a range of testimony: by the representations in Exhibit 14A that one group of six samples was composited (Buckshot, Rattler, Clearview, Lizard Gulch, Buster and Mesquite) and another group of four samples (Sunshine, Hawk, Baldy and Harbor); by Schroter's testimony at the Administrative Hearing that the hold or spare samples were never tested; by Vidor's affidavit of May 18, 1976 asserting that no tests had ever been run on the spare samples and that they remained intact (Enclosure No. 7); by the deposition of Claude Dean Pitts to the effect that the spare samples were still retained by the lab (May 19, 1976, p. 68) and by the notations on the test sheets themselves, which indicate that two sets of nine samples were composited for testing but make no reference to inclusion of the hold samples.*/ It seems clear that only test samples were combined, but even with this belated effort to compensate for the samples' inadequacies, they continued to violate the requirements imposed by the state for the L.A. Rattler test. Given the presence of materials exceeding 2.5 pounds, in several of the

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*/ Sainte-Claire's suggestion that all of the test and hold samples were combined is further thrown into question by the results recorded on the test sheets. Instead of showing the same test results (which would flow from a single test of combined samples), they reflect a number of different L.A. Rattler test results.

samples, the overall sample weights remained deficient.*/

In any event, the main significance of the testimony concerning combining and compositing of samples is twofold: it indicates that contestants were aware that their sample wieghts were too small, given the presence of rock materials, to comply with the testing regulations established by the State of California; that they attempted, improperly, to cover up this deficiency; and that, in the process of the coverup they repeatedly contradicted themselves, thereby throwing into question the probity of all of the evidence and testimony pertaining to the Schroter testing program.**/

Mr. Schroter, the contestants' chief witness, testified during deposition that all of his testimony and conclusions were based on his sampling and test results. (Schroter Deposition, April 7, 1975, p. 25). This was confirmed by the State's attorney, Mr. Vidor, who stated during the DOI hearing that the expert witnesses were basing their testimony

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*/ It should be noted that at the time of the administrative hearing, there was no way that Doria could challenge the L.A. Rattler tests introduced by Schroter. Only the test results were listed, with no divulgence of the test sheets themselves. Further, because the results were stated to be the end product of tests performed by a state laboratory (see Enclosure 3, Item 5, on page 2), there was a presumption of validity.

**/ It should be noted that if, in fact, the samples were composited, this was a violation of the California regulations which call for separate per sample procedure for each of the tests numbered 202, 211 and 217.

entirely on the sampling and test results (Tr. 105). Once the testing results are removed from the record, contestants have no case and, equally important, there is no "substantial evidence" upon which the ALJ or IBLA decisions can be based.

The discussion in the previous pages establishes beyond question that the testing and sampling conducted by Mr. Schroter and the state testing lab was fraudulent and deficient. Despite the fact that he was warned that his sample weights were too small to conform to state standards, Schroter took no steps to correct the situation. He persisted in having the state test samples that were deficient both in content (no boulders or rock) and size (not heavy enough to meet state standards). The result was defective testing. Recognizing the deficiencies in the testing, both Schroter and the lab attempted to cover their tracks by a variety of efforts that are reflected in severe contradictions in the sworn testimony taken in the various state court proceedings that have been instigated by Doria to vindicate its rights. These contradictions include: discrepancies between the data recorded in Exhibit 14A and that recorded on the xerox copies of the test sheets maintained by the lab; conflicing statements concerning separate samples of rock that may or may not have been taken from each claim to correct the non-representative nature of the original samples; belated stories of compositing some or all of the samples to

increase their bulk to the level required for the state prescribed tests and endless contradictions concerning the sample weights. In attempting to cover up their faulty sampling and testing program, Schroter and the state testing lab officials have produced a web of lies that strongly supports Doria's position that the entire testing program must be disregarded.

(c) False or Inaccurate Testimony Concerning Marketability

As noted above, besides his testimony concerning the sampling and testing of the material on the Doria claims, Schroter also gave testimony to the effect that the materials were unmarketable. This testimony was given significant weight by the IBLA, which concluded: "the claims were at a mileage disadvantage compared to established commerical producers both in San Bernardino and Victorville ....the established producers were adequately supplying the needs of the relevant market area with better quality material."

The evidence discovered subsequent to the hearing which is discussed above undermines totally any conclusions concerning the quality of the material that the administrative and judicial tribunals may have derived from Schroter's testimony. The following discussion shows that Schroter's statements concerning marketability are similarly vulnerable.

Schroter testified during the DOI hearing that he made an extensive marketability study,*/ including interviews with potential users of the Doria materials and that this study clearly demonstrated that the materials could not be sold. The reliability of this study has already been thrown into question by Schroter's statements that he didn't estimate economic trucking distances because the materials were worthless and that he didn't know where Barstow was located vis-a-vis Victorville, a major marketing area for sand and gravel (see p. 27 above). Further, Schroter stated unequivocally that the materials were not and could not have been used for the construction of two interstate highway projects constructed near the claims during 1930-32 and 1968-70; this also has been subsequently shown to be false.

In regard to the highway projects, California Highway Engineer Material Report of 1951 (see p. 27 above) indicates that materials from the Doria placers were used to build the 1930-32 freeway and that, even with the heavy traffic over the route, the materials stood up well with low maintenance

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*/ The fact that contestants undertook a marketability study at all strongly suggests that they knew the Doria materials to be valuable. If, in fact, the testing program had shown the materials to be valueless, it would have been unnecessary to even introduce evidence concerning the availability of markets. Further, it is questionable whether Schroter was equipped to perform this study. At his deposition of May 19, 1975 Schroter stated that his expertise did not extend to the production and marketing of sand and gravel aggregates for concrete or other sand and gravel products.

costs. Similarly, as noted on p.20, it has been disclosed since the DOI hearing that the Vinnel Corporation, a sub-contractor of the state of California, produced highgrade products from the Doria claims to build portions of the Interstate 15 freeway constructed in the late '60's.

Besides these substantial public markets, there were more than adequate private markets for the Doria materials from the date of their discovery to the date of the trespass and mining of the deposits for the Interstate 15 freeway. Among the facts introduced into evidence that support this conclusion are the following: (See Enclosure No. 12 for a graphic representation of the location of each of the deposits discussed, in relation to the Victorville market. The numbers designated below correspond to locations on that map.)

Barstow suppliers (5) sold to Victorville markets (1) throughout the period in question; this was demonstrated by Barstow operators and by their customers. Barstow was a major supplier despite the fact that the Oro Grande despoit (4), operated by contestants' witness Thwing, had a distinct haulage advantage (the latters was only six miles north of Victorville, while Barstow was 31 miles north of the city).*/ There is a strong inference that if Barstow could serve this market, Doria (2) certainly could have as well, because its deposits were only 16 miles from the city.

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*/ Thwing's testimony concerning the ability of Oro Grande to meet Victorville needs is somewhat shaky, given the fact thatSchroter testified (T. 94-95) that the Oro Grande Valley consists of worthless fanglomerates.

A major market in Victorville was that represented by Mr. Hove. Hove operated a cement batch plant just outside of Victorville (3) and also purchased sand and gravel for other uses. Hove testified that he purchased sand-gravel aggregates from Thwing's Oro Grande deposit (4) from about 1955 to 1967 for his cement batch plant at Hesperia. Thwing testified that the Oro Grande deposit was depleted in 1967, and that, thereafter, he moved the plant to Pearblossom, some 30 miles from Victorville, where he operated it until around 1971 or 1972. He claimed that he had to close down Pearblossom because of a lack of Victorville markets. This conclusion, hoever, was thrown into question by Hove, who stated that during the period 1967 to 1972, he purchased his aggregates from Lancaster and Palmdale (8), about 50-55 miles outside of Victorville. Around June 1972, Hove placed into production a sand-gravel deposit in Lucerne Valley (6), a deposit about 24-25 miles from Victorville that he had acquired around 1955. In short, Hove's testimony contradicts Thwing's and makes it clear that continuing markets existed in Victorville for sand and gravel materials, even if they could only be obtained at a haulage distance of anywhere from 25 to 50 miles. (While these deposits were being marketed, the Barstow plants remained in operation, indicating a demand for multiple sources of sand and gravel, despite the considerable distances of the sources from Victorville).

Statements made by Thwing corroborate the fact that the Victorville consumers were willing to and did go to distances considerably beyond the Doria locations to obtain sand and

gravel. Thwing, at his deposition of October 13, 1977, testified that despite its location 31 miles from Victorville, Barstow was supplying the Victorville markets prior to 1937 when he first got into the business. Similarly, Lytle Creek, located 40 to 45 miles from Victorville, also supplied the area prior to 1937. At the conclusion of the same deposition, Thwing asserted that both Barstow and Lytle Creek are still supplying Victorville.

The above testimony strongly suggests that given the quality of the Doria materials (as established by the evidence introduced by Doria), they could readily have been marketed in Victorville and, in fact, would have had a distinct haulage advantage over suppliers upon which the area relied throughout the period 1955 to 1973.

3. Conclusion:

The above discussion makes it abundantly clear that the evidence introduced by the contestants in validity contest R-4873 and relied upon by the ALJ, the IBLA and the District Court, was seriously tainted. The testimony concerning the quality of the materials located on the Doria properties -- which served as the keystone of the administrative and judicial decisions -- was based on sampling and testing procedures that were conducted in such a fashion as to violate the laws and regulations of the State of California.

In fact, the procedures were so defective as to render the test results useless as a tool for assessing the Doria materials. Not only were the samples taken from the Doria properties unrepresentative in content, but they were also of insufficient weight to meet the test requirements. The tests themselves were improperly performed, compounding the errors surrounding the sampling process. The efforts of the state testing lab and the contestants' chief witness to explain these deficiencies subsequent to the hearing in R-4873 have been so full of contradictions and false statements as to create a strong inference that they are involved in a "cover-up."*/

Finally, although the question of the marketability of the materials was never given very serious attention by the decision-makers (the materials were largely assumed to be unmarketable because of their alleged low quality), the evidence introduced by contestants concerning marketability has also been demonstrated to be incorrect and inaccurate. The most striking example of this pertains to the public highway market during the period in question; Doria has

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*/ There is no other way to explain the loss of Schroter's field notes, the destruction of the state lab's test sheets recording the sample weights, the belated, unexplained and unsubstantiated appearance of a whole new set of samples containing rock material only from each claim, the conflicting statements concerning the compositing or combining of various samples for the L.A. Rattler test -- and a host of other discrepancies.

demonstrated that the State of California actually made use of vast quantities of its materials for the construction of Interstate 15; in fact, the state's intention to use the materials for that purpose in large part explains its use of dishonest and fraudulent means to support its case in the validity contest. In addition to the public market, Doria has also demonstrated that significant demand existed for its materials in the private market, particularly in the Victorville area; during the period in question suppliers located at considerably greater distances from Victorville than Doria had no difficulty selling their sand and gravel in that market.

The unfairness and deception practiced by contestants on Doria during R-4873 in themselves justify a new hearing. Absent the tainted testimony, there is no "substantial evidence" to support the ALJ, the IBLA or the District Court decisions. This conclusion that a new hearing is required is buttressed by the fact that Doria has performed in good faith since its discovery of the placer claims and came into the validity contest with "clean hands." The original owners repeatedly attempted to bring the claims to the point where they would be ready for processing. Through their lack of experience and knowledge, they initially failed in these efforts, but

they were moving to production when these proceedings were initiated. At no time were the Doria principals engaged in the use of federal lands for improper purposes (as has often been the case where claims are declared invalid); their unquestioned intent was, and continues to be, to develop the claims to full marketability.

In presenting its case in R-4873, Doria demonstrated that its materials were of sufficient quality to justify processing and distribution of a number of marketable materials, including feldspathic sand, mica, magnetic, fine aggregate and coarse aggregate. In fact, the Doria principals are prepared to begin processing immediately and to invest substantial amounts of money in the mining operations.

The materials located on the Doria claims have not changed or altered significantly during the years the validity contest and the appeal therefrom have been pending. This is not a case where it can be properly argued that, although there is strong evidence of fraud and collusion, circumstances have so changed since the acts complained of as to make a rehearing impracticable. On the contrary, the acts of fraud perpetrated on Doria, combined with the fact that it is a simple and uncomplicated matter to collect and present new evidence on the value of the claims, mandate a rehearing of the case.

For the above reasons, Doria, through the undersigned counsel, respectfully requests Secretary of the Interior Andrus to agree to a rehearing in this case, which proceeding will commence as soon as Doria has taken the necessary steps to have its appeal stayed or dismissed in federal court.

Respectfully submitted,

Sarah C Carey

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